



## **CHRYSLER FRAUDULENT TRANSFER CASE STUDY PART II CONSTRUCTIVE FRAUDULENT TRANSFER UNDER THE BANKRUPTCY CODE AND THE UNIFORM FRAUDULENT TRANSFER ACT**

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October 13, 2009

Following up on earlier blog posts [here](#) and [here](#), this installment of the Chrysler fraudulent transfer case study will discuss the causes of action provided by the Bankruptcy Code and by the [Uniform Fraudulent Transfer Act](#) (UFTA) for constructive fraudulent transfer.

First it should be noted that New York is not governed by the UFTA, it is governed by the Uniform Fraudulent Conveyance Act, a predecessor to the UFTA. Around 40 of the 50 states are governed by the UFTA. With certain exceptions that are beyond the scope of this article, however, the Bankruptcy Code's fraudulent transfer provisions, the UFTA, and the Uniform Fraudulent Conveyance Act are the same.

Secondly, it is important to note the difference between an intentional fraudulent transfer and a constructive fraudulent transfer. A cause of action for intentional fraudulent transfer alleges that the debtor made a transfer of property with actual intent to hinder, delay or defraud any creditor to whom the debtor is or will become indebted. This cause of action is simpler to allege, but as we will discuss in coming posts, is usually more difficult to prove, because it requires subjective evidence of fraudulent intent, which is not easy to come by. To prove a constructive fraudulent transfer, the creditor must allege more facts, but these facts are more objective and therefore easier to prove.

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Constructive fraudulent transfers and intentional fraudulent transfers are equally avoidable, and the remedies available to creditors are also virtually the same. Under both the Bankruptcy Code and the UFTA, fraudulent transfers may be undone by the court. So if a debtor quit claims property to a relative or, in the case of a business entity, and the transfer is found to be either intentionally fraudulent or constructively fraudulent, the court can order conveyance of the property back to the debtor so it may be used to satisfy the creditor's claim. Similarly, both the Bankruptcy Code and the UFTA provide for money damages against transferees. So if the property transferred has been subsequently conveyed or lost, but the transferee has as a result of the transfer obtained a financial benefit, the transferee can be ordered to pay the monetary value of the benefit to the creditor. For instance, if the debtor transfers property to a relative, who then sells the property to a *bona fide* purchaser for value, even if the *bona fide* sale can't be undone in order to attach the property, the debtor's relative can be sued for the money he obtained as a result of the sale.

[11 U.S.C. § 548\(a\)\(1\)\(B\)](#) sets forth the circumstances under which the Bankruptcy trustee may avoid a transfer even in the absence of evidence of actual intent to defraud creditors. It provides that the transfer is fraudulent if the debtor did not receive reasonably equivalent value for the transfer, and if one or more of the following is true:

- the debtor was insolvent when the transfer was made or became insolvent because of the transfer,
- the debtor was engaging in a business transaction or was about to engage in a business transaction that the debtor essentially could not afford
- the debtor intended to incur debt it knew it could not satisfy or believed it might not be

able to satisfy

- the debtor made the transfer to an insider

As stated above, the UFTA provisions are almost identical. See, for example, [Florida Statutes sections 726.105\(b\) and 726.106](#).

In the Chrysler case, the allegations are (1) that Daimler and its shareholders caused Chrysler to transfer substantial assets to its sister company without providing Chrysler reasonably equivalent value for the assets, and on the verge of insolvency and with knowledge and belief that it was incurring debts it could not satisfy, including pending lawsuits against Chrysler, and (2) that Daimler's ordering Chrysler to satisfy \$1.825 billion in debt for which Daimler was a guarantor constitutes a transfer for the benefit of an insider without reasonably equivalent value. Fraudulent transfers occur in cases concerning debtors and creditors of all sizes, and the Chrysler case provides a particularly large and complicated set of facts. It is not yet clear whether Daimler will be found liable, and extensive discovery will be necessary to prove the creditor's committee's case. More common scenarios of constructive fraudulent exist in the cases we see every day. For example, the following scenarios likely constitute fraudulent transfer:

- an individual who is on the verge of having a lawsuit filed against him sells his investment property at a reduced sale price to a family member with the understanding that the brother will share the rental income with the debtor;
- a judgment debtor executes a quitclaim deed conveying property he owns all himself to himself and a friend or relative as tenants in common without receiving payment from the friend or relative;

- a corporation pays off an existing shareholder loan when its accounts payable become more than the corporation believes it can pay;
- a company on the verge of bankruptcy enters into a long term employment contract with the owner's wife for a position she is not qualified for

There are many circumstances that could be construed to constitute a constructive fraudulent transfer. See [this page at the Florida Asset Protection Blog for more examples](#). Remedies for fraudulent transfer are all too often overlooked by creditors and their attorneys. [Contact the author](#) for more information.